IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 827 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ASHOKBHAI CHHOTUBHAI VASAVA

Versus

STATE OF GUJARAT

Appearance:
MR PANKAJ K SONI for Appellant
THROUGH JAIL for Petitioner No. 1
MR KG SHETH ADDL PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 03/07/2002

ORAL JUDGEMENT (Per : MR.JUSTICE Y.B.BHATT)

1. This is an appeal by the appellant who has been tried and convicted by the Sessions Court, Bharuch, in Session Case No. 22/99, and found guilty of the offence under Section 376 IPC and sentenced to RI for 10 years and with fine in the sum of Rs. 500/- in default simple imprisonment for one month.

2. In the present appeal, we have carefully perused the impugned judgment of the conviction passed against the appellant, heard learned counsel for the appellant and we have also perused the record and proceedings of the case.

3. As a result of this exercise, we are satisfied that the impugned judgment of conviction and sentence is eminently justified on the basis of the evidence which has completely established the prosecution case, and consequently this appeal is liable to be dismissed.

4. A few salient features are required to be noted.

The prosecution case was that the complainant Lilaben and the accused Ashokbhai were living together as husband and wife. The complainant Lilaben was earlier married to one Ratanbhai and this marriage resulted in one son and two daughters. The youngest child of this marriage was a daughter by the name of Jyotsana who was about 10 years old at the time of the incident. The accused was also married earlier, but his wife expired without any issue. Under these circumstances the accused and the complainant were living together along with the complainant's daughter Jyotsana.

On 10.11.1995 at about 10.30 a.m. the couple had gone to Amod leaving the daughter Jyotsana at home. They returned at about 2.00 p.m. At this point of time, the accused told the complainant that he wanted to visit his maternal uncle and he wanted to take the minor Jyotsana with him. Thus, the accused and Jyotsana left together. The complainant remained at home. Thereafter at about 11.00 p.m. the accused returned with Jyotsana and the complainant found that Jyotsana was upset and frightened. On inquiry Jyotsana said that she had gone to the river and fallen down and was therefore hurt. The complainant examined her daughter Jyotsana but did not observe any obvious external signs of injuries. However, Jyotsana was still in a frightened and nervous mind and after some time she told the complainant that she wanted to visit the toilet. Therefore the mother took Jyotsana to the toilet where the complainant found that there was bleeding from the private parts of Jyotsana. The

complainant therefore made further inquires with Jyotsana, who informed her mother the complainant that the accused had taken her below the railway bridge along the bank of the river and committed rape upon her and further threatened her that if she informed any other person including her mother, the accused would stab her to death. According to Jyotsana it was for this reason that she was frightened and did not disclose the event immediately.

The complainant thereupon on the very next day went to the Bharuch 'A' Division Police Station and filed the complaint. Jyotsana was sent for her physical examination, her clothes were attached under a panchnama and the panchnama of the scene of offence was also prepared. After the statements of various witnesses were recorded, the Police attempted to apprehend the accused but he was not found. The Police continued the investigation. The accused was ultimately apprehended about 3 years later on in connection with another offence. In the meanwhile further investigations were carried out upon the muddamal articles, viz. clothes of the victim Jyotsana, blood and serological samples obtained of Jyotsana, and thereafter serological reports in respect of the semen, saliva and blood of the accused after he was apprehended.

5. It was on the basis of the complaint filed by the mother of Jyotsana and the investigation carried out, and result of the deposition of various witnesses of the prosecution, that the Sessions Court found that the prosecution had established the case against the accused beyond reasonable doubt.

6. Learned counsel for the appellant has sought to over emphasize the fact that the prosecution has not examined the complainant or her daughter the victim Jyotsana as witnesses. However, the prosecution has established that the offence occurred in the night of 10 - 11th November, 95, that the accused was absconding on the date of the complaint on 11th November, 95, and that he was apprehended only on 24th October, 98, in the meanwhile the complainant mother Lilaben and her daughter Jyotsana had no fixed place of residence, inasmuch as under the circumstances, no mother would remain in the house of her husband, where her husband had committed rape upon her own daughter. The record of the case establishes that even when the case was taken up for hearing by the Sessions Court on many occasions, the Sessions Court had issued summons to the complainant and Jyotsana, but the Police authorities were unable to find

these persons, and accordingly a report was filed. This police report indicates that both mother and daughter are untraceable. Under these circumstances, the prosecution cannot be faulted for not examining the complainant and her daughter, the victim Jyotsana. In the present case, the material question is as to whether the prosecution has succeeded in establishing its case on the basis of reliable and credible evidence and beyond the reasonable doubt.

7. PSO Motibhai Govindbhai has been examined at Exh.28, who has established the place, time and circumstance under which the complaint was given by the mother Lilaben at Bharuch 'A' Division Police Station. He has established that he was on duty at the time and place, the complainant had come to the police station in person and he himself had recorded the said complaint, which is exhibited at Exh.29. He further deposed that the right hand thumb impression of the complainant was taken by him in his presence. There is no reason to disbelieve the evidence of this witness inasmuch as he is an independent witness, and no suggestion has been made on behalf of the accused that there is any enimity or bias for which he would be inclined to depose falsely.

8. The law on this aspect is amply clear and does not require a detailed discussion. The law does not require that the complainant must be examined, and in the absence of which a conviction on the basis of other reliable and credible evidence cannot be sustained. The contents of the complaint establish that the accused and his daughter Jyotsana left the house in the afternoon on 10th November, 1998 and returned at about 11.00 p.m. at night. It is, therefore, obvious that whatever occurred in the meanwhile, and whatever was suffered by Jyotsana in the meanwhile, was on account of fear of the accused during the relevant time. The complaint is also specific that when Lilaben asked her daughter Jyotsana as to why she was upset and nervous, the first explanation offered by Jyotsana was that she had fallen down on the river bank and was injured. However, some time later when Jyotsana wanted to visit the toilet, in these conditions and in this situation, the complainant accompanied the daughter to the toilet and it was then she found that Jyotsana was bleeding from her private parts, and on further inquiry Jyotsana narrated to her mother the entire incident, namely, the accused took her below the railway bridge on the bank of the river and raped her and threatened her not to disclose this event to her mother or to anyone else, other wise the accused would kill her with knife.

A panchnama was prepared in respect of the scene of offence and it has been proved by the Police Officer. The fact that the panchas had turned hostile can in law only mean that there is no independent corroboration so far as this panchnama is concerned. However, that by itself is no reason to discard the panchnama, or to refuse the contents thereof as evidence, if the evidence of Police Officer who has proved the panchnama is other wise reliable and credible. This Police Officer has stood the test of cross-examination and we agree with the Sessions Court in observing that the panchnama is duly proved as per the rules of evidence.

9. Dr. Rashmikant Mehta at Exh.10 has deposed that he had conducted the physical examination of the victim Jyotsana on the evening of 12th November, when the said Jyotsana was produced before him by a Police Yadi with a lady constable. He examined the said Jyotsana with the consent of her mother the complainant Lilaben. His deposition establishes that the female organs of Jyotsana were not fully developed, that there were spots of blood near her private parts and inside of both thighs, that her labia majora and labia minora were reddish, inflamed and painful to the touch, that below the vagina there was blood injury of irregular shape about 1/2 x 1/2 cm, that the hymen was torn in the direction of 3'O clock and 6'O clock, and that same was still oozing fluid and blood, and that it was not possible to insert the smallest finger through this injury. In the opinion of this Doctor Jyotsana had been subjected to violence with the aim of sexual intercourse. The Doctor has further opined that such injuries were possible only when penetration had been effected into the private parts. The Doctor has also deposed that said Jyotsana was less than 10 to 12 years of age. The relevant certificates have been proved by the deposition of Dr. Rashmikant Mehta and is exhibited at Exh.12, and the police yadi is exhibited at Exh.11. In the cross-examination of this medical expert, the only attempt made was to indicate that such injuries are also possible by means other than penetration by the male organ. It was suggested that if the girl had gone to urinate in a field, she could have been injured by dried sticks of Juvar or that such injuries were possible if someone attempted to push a finger into the private part of the girl. However, these are mere suggestions and would not cast any serious doubt upon the prosecution story, once the reports of the Forensic Science Laboratory are examined, and read with contents of the complaint at Exh.29.

10. Exhibit 14 is a panchnama of the clothes of Jyotsana attached at the police station on 11th November. This has been established by the panch Bharatbhai Durlabhbhai at Exh.13. This panch has stood the test of cross-examination on behalf of the accused. It is further corroborated by the evidence of PSI Parmar at Exh.30.

11. Once the accused was apprehended, almost three years after the incident, on 24th October, 1998, the accused was examined by Medical Officer on 25th October, 1998. The doctor has opined that the accused is capable of sexual intercourse, but it is difficult to say whether he was capable of sexual intercourse three years ago. Furthermore, samples of blood, saliva, hair and semen were taken of the accused and sent to the FSL, which is at Exh.25.

12. The report of the FSL indicates that the earth attached from the scene of offence does not disclose any blood and/or semen, that the test in respect of the saliva of the accused is ambiguous or uncertain, that the blood of the accused was of 'O' group, that the semen of the accused was 'O' group whereas the saliva and blood of the victim Jyotsana was of 'B' group. In this context, it is significant and pertinent to note that the clothes, and particularly the pajama of the victim Jyotsana which was attached and sent for serological report indicates the presence of semen and the same was of 'O' group. Furthermore the accused was absconding from the date of the complaint, and it was thereafter, during the course of investigation, the police had attached the pajama of the victim. It is, therefore, obvious that except on the date of the incident, namely, on the night between 10 and 11th November, 1995, there was no other occasion or opportunity for the semen of the accused to come upon the pajama of the victim. No explanation in this regard has been offered by the accused. As aforesaid, the medical examination of the victim Jyotsana clearly establishes that she was subjected to violence in her and around her private part, that her hymen was torn, that there was penetration, accompanied by inflammation and bleeding.

13. From the very circumstances in which the complainant, the daughter and accused are placed, and established on record, where the complainant and the accused were living together as husband and wife together with the victim Jyotsana, who was the daughter of the complainant from the earlier marriage, the accused was in the place of the father of Jyotsana. Under these circumstances, there is absolutely no reason whatsoever

for either the complainant or the victim to falsely implicate the accused.

14. In the premises aforesaid, we find that the impugned judgment of conviction and sentence passed by the Sessions Court is eminently sustainable and no interference by way of the present appeal is justified. This appeal is therefore dismissed.

(Y.B. Bhatt,J.)

(J.R. Vora, J.)

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